(2)

Office - Supreme Court, U.S.
FILED
APR 29 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1544

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DAVID E. MILLER,

Petitioner,

vs.

COMMISSIONER OF REVENUE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

BRIEF IN OPPOSITION OF RESPONDENT

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
THOMAS R. MUCK
Counsel of Record
Deputy Attorney General
Department of Revenue
P.O. Box 64446
Centennial Office Building
St. Paul, Minnesota 55164
(612) 296-3421

224-7631 BEST AVAILABLE COPY 4-7631

14 pp

QUESTION PRESENTED

Whether the commerce clause and due process clause prevent Minnesota from applying its use tax to farm machinery bought in North Dakota for use in Minnesota on the basis of sales price, just as if the machinery had been purchased in Minnesota and subjected to the Minnesota sales tax?

PARTIES INVOLVED

Petitioner is a resident of North Dakota who owns and farms land in Minnesota and in North Dakota. Respondent is the Commissioner of Revenue of the State of Minnesota. Respondent is responsible for administration and enforcement of Minnesota's sales/use tax.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties Involved	ii
Table of Authorities	iv
Statement of the Case	2
Reasons for Denying the Petition	3
Conclusion	9

TABLE OF AUTHORITIES

Page

Cases:

Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1977) 4

Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963) 4

Hans Rees' Sons, Inc. v. North Carolina, Ex Rel Maxwell, 283 U.S. 123 (1931) 7

Henneford v. Silas Mason Co., 300 U.S. 577 (1937) 4, 5, 6

Moorman Manufacturing Co. v. Bair, 437 U.S. 267 (1978) 7

Miller v. Commissioner of Revenue, 359 N.W.2d 620 (Minn. 1985) 5

National Geographic Society v. California Board of Equalization, 430 U.S. 551 (1977) 4

Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941) 4

Norfolk and Western Ry. Co. v. Missouri State Tax Commission, 390 U.S. 317 (1968) 7

Southern Pacific Co. v. Gallagher, 306 U.S. 167 (1939) 4

Statutes and Regulations:

Minn. Stat. § 297A.01 2

Minn. Stat. § 297A.14 ..... 2, 3

Minn. Stat. § 297A.23 9

Minn. Stat. § 297A.24 2

Minn. Stat. § 297A.25, subd. 3 8

Minn. Rule 8130.4300, subd. 1 8

N.D. Cent. Code § 57-40.2-04 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1544

DAVID E. MILLER,

Petitioner,

vs.

COMMISSIONER OF REVENUE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

BRIEF IN OPPOSITION OF RESPONDENT

The respondent Minnesota Commissioner of Revenue respectfully requests that this Court deny the petition for Writ of Certiorari seeking review of the decision of the Supreme Court of Minnesota in this case. The opinion of the Minnesota Supreme Court is reported at 359 N.W.2d 620 (Minn. 1985).

STATEMENT OF THE CASE

Petitioner is a resident of North Dakota who owns and farms approximately 11,000 acres of farmland straddling the Minnesota/North Dakota border. During the period 1977 through 1980 petitioner purchased approximately $766,000 worth of farm machinery—all of it in North Dakota. The machinery was purchased with the intention of using it on the farm land in Minnesota. It was also to be used in North Dakota. The machinery was in fact used regularly in Minnesota, as well as in North Dakota.

Respondent Commissioner of Revenue assessed a use tax of approximately $21,000 pursuant to Minn. Stat. § 297A.14 upon the machinery he believed was used on the farmland in Minnesota. Respondent assessed no tax upon the machinery he believed was used only in North Dakota.[1] In computing the 4% Minnesota tax due, respondent gave petitioner credit for the 2% sales tax petitioner had paid North Dakota on the purchases.[2]

---

[1] Respondent does not contend that any machinery not used in Minnesota is subject to the tax. A factual issue presented to the trial court (the Minnesota Tax Court) concerning whether certain machinery was actually used in Minnesota was resolved by the trial court in petitioner's favor (see Finding of Fact No. 5, Conclusion of Law No. 1, Appendix to Petition at p. A-3) and was not appealed by respondent to the Minnesota Supreme Court.

[2] Minn. Stat. § 297A.24 provided during the relevant years as follows:

> TAXES IN OTHER STATES. If any article of tangible personal property or any item enumerated in section 297A.14 has already been subjected to a tax by any other state in respect of its sales, storage, use or other consumption in an amount less than the tax imposed by sections 297A.01 to 297A.44, then as to the person who paid the tax in such other state, the provisions of section 297A.14 shall apply only at a rate measured by the difference between the rate herein fixed and the rate by which the previous tax was computed. If such tax imposed in such other state was four percent or more, then no tax shall be due from such person under section 297A.14.

Petitioner asserted to the trial court (the Minnesota Tax Court, an administrative court) and, on appeal, to the Minnesota Supreme Court various commerce clause and due process objections. Both Courts rejected his constitutional arguments. The Tax Court, however, construed the computation provisions of Minnesota's sales/use tax statute to permit what it called "prorating" the amount of the assessment. Under its prorating calculation the Tax Court found the Commissioner should assess only 68% of the purchase price of the property since 68% of petitioner's farmland and his actual use of the machinery was in Minnesota, the remaining 32% in North Dakota. The Minnesota Supreme Court reversed the Tax Court on this issue of state law, finding that the Tax Court's manner of computing the tax had no statutory basis and would indeed frustrate the purpose of the use tax.

REASONS FOR DENYING THE PETITION

Petitioner offers no decision of this Court, a federal court of appeals or any other state court with which the decision of the Minnesota Supreme Court is in conflict. Petitioner indeed cannot do so since the result reached by the Minnesota Court is completely in tune with decisions of this Court and is also consistent with the practice of tax administrators in other states. In short, petitioner raises no issue that warrants review by this Court.

Minnesota's use tax, Minn. Stat. § 297A.14, quoted at p. 2 of the petition, is a corollary to its sales tax. Its purpose is to compensate the state for lost sales tax revenue from transactions in which property is bought elsewhere but for the purpose of use in Minnesota. Enacting a use tax in tandem with a sales tax prevents the drain on sales tax revenues that would result from purchases in other states of property intended for

use in Minnesota in order to avoid the sales tax. It also causes retail dealers in the taxing state to be on terms of equality with dealers in states having no or a lower sales tax. *See generally Henneford v. Silas Mason Co.*, 300 U.S. 577, 583 (1937); *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 555 (1977).

The constitutionality of sales/use statutes is well settled. *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 555 (1977). *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937), is the landmark case on use taxes (or "compensating taxes" as they are sometimes called). This Court held in *Henneford* that a use tax was upon the privilege of use in a state after interstate commerce had ended and thus was not upon the operation of interstate commerce. It also held that a use tax calculated on the basis of the purchase price did not burden or discriminate against interstate commerce where it was subject to an offset (like Minnesota's) for sales taxes paid to another state on the same transaction. The offset simply put interstate commerce on an equal footing with local commerce. By reason of the offset there is no extra burden on interstate commerce and there is no duplicative taxation. The policy emerging from *Henneford* thus was that a use tax is valid as a compensating tax to complement a sales tax and make all items equally taxable whether purchased in the taxing state or not.

Petitioner makes no mention of the *Henneford* case, nor those cases since *Henneford* that have referred to it as sound law.[3] Nor does petitioner mention the violence his theory does

---

[3] See e.g. *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 555 (1977); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 331-32 (1977); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 70 (1963); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941); *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 171 (1939).

to the policy of *Henneford*. Imposing some "apportionment" restriction as proposed by petitioner that would prevent Minnesota from applying its use tax on the basis of the full sales price would be inconsistent with what *Henneford* recognized as sound and constitutionally permissible state taxation policy. *Henneford* recognized that equalizing treatment of instate and out-of-state purchases of property intended to be used in the state was legitimate. A state may impose a use tax on the privilege of using property in the state on such terms as will place the buyer on the same footing as if he had bought the property in the state in which it was to be used. The petitioner's approach would cause items purchased out-of-state (and therefore subject to the use tax) to be taxed to a lesser extent than items purchased instate and subject to the sales tax. Inequality of treatment of instate and out-of-state purchases would result and incentives would be created to avoid purchases in high sales tax states such as Minnesota. The Minnesota Supreme Court therefore correctly observed in its opinion that the purpose of the use tax to eliminate incentives to make major purchases in states with a lower tax would be frustrated if the tax could not be imposed on the full sales price. *Miller v. Commissioner of Revenue*, 359 N.W.2d 620, 622 (Minn. 1985).

Petitioner ignores *Henneford* and instead proceeds on the basis of two assertions—first, that the Minnesota use tax results in "duplicate taxation" and second, that it is somehow "extraterritorial". See Petition at p. 7. On the strength of these assertions petitioner concludes that Minnesota's use tax must be apportioned. The assertions are faulty and so is petitioner's reasoning concerning the relevance of apportionment methodologies to this case.

Imposition of Minnesota's use tax does not result in duplicate taxation. In computing the use tax Minnesota gave petitioner credit for the sales tax that he paid in North Dakota,[4] just as Washington had given the taxpayer in *Henneford*. Petitioner is not, moreover, subject to any North Dakota use tax because he has already paid the North Dakota sales tax on the machinery.[5] Imposition of the Minnesota use tax thus does not result in duplicate taxation.

Petitioner's assertion that the Minnesota use tax is somehow extraterritorial is likewise erroneous. The incidence of the tax is upon the privilege of using property within Minnesota. Minnesota taxes nothing outside its borders in taxing machinery actually used in this state. Minnesota's use tax cannot therefore by reason of the nature of its incidence be extraterritorial.

Apportionment methodologies and the cases from other areas of taxation where apportionment methodologies were used which Petitioner discusses have no relevance to this case. Those cases, unlike the instant one, did present some legitimate problem of extraterritoriality. Accordingly, apportionment methodologies—which are a means of curing extraterritoriality—were appropriately discussed. The corporate income tax cases mentioned by petitioner, involving multistate corporations whose business and consequently whose income are essentially indivisible on a state by state basis, presented an

---

[4] See footnote 2, supra.

[5] N.D. Cent. Code § 57-40.2-04 provides:

> Exemptions. This chapter hereby is declared to be an independent and separate tax law but complementary to the retail sales tax laws of this state provided for by chapter 57-39.2 and shall not apply to:
>
> 1. Any tangible personal property or taxable service upon the sale of which the retail sales tax imposed by chapter 57-39.2 has been collected by a retailer holding the permit prescribed by section 57-39.2-14.
>
> . . . .

extraterritoriality problem.[6] An apportionment methodology was necessary in those cases to artificially ascribe to a single state a portion of that income in such a way that the state could be said not to be taxing beyond its borders. The case petitioner discusses involving a personal property tax on rolling stock of a railroad (the property of the railroad which had no fixed location, e.g. locomotives, cars) presented an extraterritoriality problem.[7] There the situs of this constantly moving property, for property taxation purposes, was not fixed within the state and an artificial means of determining it was therefore necessary.

The instant case is, however, unlike the cases petitioner discusses since Minnesota's use tax was imposed only on that which is indisputably within the borders of Minnesota—petitioner's use of his farm machinery in Minnesota. This case thus presents no issue of extraterritoriality and no resort to apportionment methodologies is therefore necessary. If this case has analogies in other areas of taxation, they are situations which similarly present no extraterritoriality concerns. An example in income taxation is a tax on income earned within the taxing state. Such an income tax falls only on that which occurs within the state (the earning of income) and is therefore not extraterritorial. An example in property taxation is imposition of a real property tax on property within

---

[6] *Hans Rees' Sons, Inc. v. North Carolina Ex Rel Maxwell,* 283 U.S. 123 (1931) and *Moorman Manufacturing Co. v. Bair,* 437 U.S. 267 (1978), cited by petitioner at p. 6 of the petition are income tax cases.

[7] *Norfolk and Western Ry. Co. v. Missouri State Tax Commissioner,* 390 U.S. 317 (1968) is cited at pp. 6 and 8 of the petition. In *Norfolk* an apportionment methodology based upon miles of track owned by the railroad in the taxing state as compared with elsewhere was at issue. The purpose of that methodology was to artificially estimate how much of the moving property had a situs in the taxing state for purposes of the personal property tax.

the state. Such a property tax falls only on that which is within the borders of the state (the property itself) and is therefore not extraterritorial. These common situations involve no question of extraterritoriality and neither does the instant case which involves a tax only upon use within Minnesota's borders. In short, cases involving extraterritorial imposition of taxes and the apportionment methodologies used to cure that extraterritoriality have nothing to do with the instant case.

At page 4 of the petition petitioner raises a nonfederal issue of statutory construction. He claims that the exemption provided by Minn. Stat. § 297A.25, subd. 3 applies. This contention was not presented to either the Minnesota Tax Court or the Minnesota Supreme Court and thus should not be reviewed by this court. In any event, § 297A.25, subd. 3 is no solace to petitioner. It exempts from use taxation the property of persons who move to Minnesota from other states to become residents here. It has no application to people who remain nonresidents. That such is its application is clear from the administrative regulation cited by petitioners at page 4 of the petition.[8]

At page 9 of the petition petitioner cites several hypotheticals which he claims support his assertion that the due process and commerce clause are offended by an "unapportioned use tax." The application of the Minnesota use tax law, however, depends initially on a factual determination that the

---

[8] Minn. Rule 8130.4300, subd. 1 interprets section 297A.25, subdivision 3 as follows:

> Except as provided in *Minnesota Statute, section 297A.25, subdivision 3 (which exempts personal property from the tax where brought in by a nonresident just prior to becoming a resident),*
>
> . . .

(Emphasis added.)

property was purchased with the intent of using it in Minnesota. There is a presumption that property brought to Minnesota was purchased for use in Minnesota. Minn. Stat. § 297A.-23. It may, however, be overcome by a factual showing of intent to the contrary. Whether any or all of the hypotheticals raised would result in a factual determination that the property was purchased with the intention of using it in Minnesota is unclear.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

HUBERT H. HUMPHREY, III
Attorney General
THOMAS R. MUCK
Deputy Attorney General
Counsel of Record
Department of Revenue
P.O. Box 64446
Centennial Office Building
St. Paul, MN 55164
(612) 296-3421
Attorneys for Minnesota
Commissioner of Revenue